

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 7, 2007

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Subject: ***In re Julie A. Squires***
Chapter 13; Bankr. No. 05-10433

Dear Counsel:

The matter before the Court is confirmation of Debtor's Chapter 13 plan, to which both Chapter 13 Trustee Dale A. Wein and the United States Department of Veterans Affairs have objected. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. For the reasons discussed below, confirmation of Debtor's Chapter 13 plan will be denied.

Summary. In April 1997, Julie A. Squires ("Squires") submitted an application for Veterans Improved Pension benefits. In her application, she stated her husband, Lee Squires, had no income and a net worth of only \$75.00. The Department of Veterans Affairs ("Veterans Affairs") approved her application, and Squires received a total of \$33,510.00 from Veterans Affairs from June 1997 to July 2000.

In July 2000, Veterans Affairs discovered Squires's husband had income and assets substantially greater than Squires had disclosed in her application and demanded repayment of the pension benefits Squires had received. Squires made only one voluntary payment of \$200.00. Veterans Affairs then filed a civil complaint against Squires in the United States District Court. Squires did not answer the complaint, and Veterans Affairs was granted a

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default judgment for \$33,310.00 plus interest. Between January 2002 and March 2003, Squires made voluntary payments totaling \$2,800.00.

In March 2002, Squires submitted another application for Veterans Improved Pension benefits. In this second application, she stated her husband had no income and a net worth of \$100.00. Veterans Affairs approved her application, and Squires received an additional \$5,334.00 from Veterans Affairs.

In May 2003, Squires submitted yet another application for Veterans Improved Pension benefits. In this third application, she stated her husband had no income and a net worth of \$0.00. Veterans Affairs again approved her application, and Squires received an additional \$5,430.00 from Veterans Affairs.

Squires and her husband filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 23, 2005. In the schedules and statements they filed with their petition, Squires and her husband stated they had combined income of \$22,024.00 in 2003 and \$32,320.00 in 2004, and further stated her husband had monthly net income of \$2,325.00.

On September 26, 2005, Veterans Affairs filed an adversary complaint against Squires, seeking a determination that her liability for the benefits she received was nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (B), 523(a)(4), and 523(a)(6). The following day, Squires and her husband received a Chapter 7 discharge, which discharged all their unsecured debts other than the debt Squires owed to Veterans Affairs. Their Chapter 7 case remained open until December 2, 2005.

In the meantime, on October 14, 2005, Squires filed a second petition for relief, this time under Chapter 13 of the Bankruptcy Code. Ten days later, she filed an answer to Veterans Affairs' adversary complaint in her still-pending Chapter 7 case, raising as an affirmative defense the automatic stay imposed by her Chapter 13 filing. On October 27, 2005, the Court entered an order conditionally dismissing Veterans Affairs' adversary complaint.¹

¹ The order provided that if the instant Chapter 13 case were dismissed, Veterans Affairs could move to reopen the adversary proceeding and further provided that if the instant Chapter 13 case were converted to Chapter 7, Veterans Affairs could file another nondischargeability complaint in the converted case, with no prejudice arising from the Court's dismissal of the adversary proceeding in Squires and her husband's Chapter 7 case.

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In her Chapter 13 plan, Squires proposed to make monthly payments of \$55.00, \$5.00 of which was to be paid to the Chapter 13 trustee for his statutory fee, and \$50.00 of which was to be paid to her attorney for the first 27 months of the plan and to Yamaha Customer Service on a claim secured by her piano for the remaining 21 months of her plan. Squires proposed no payments to Veterans Affairs, her only unsecured creditor. Both the Chapter 13 trustee and Veterans Affairs objected to the proposed plan.

At the confirmation hearing, the Court heard the testimony of Squires and Debra Clow, an employee of Veterans Affairs, and received a variety of exhibits, including the applications for Veterans Improved Pension benefits referred to above. At the conclusion of the hearing, the Court found the proposed plan was not feasible. The Court based this finding on the schedules and statements filed by Squires, which indicated her monthly expenses exceeded her monthly income, and her testimony that without her non-filing husband's contributions, which he was under no legal obligation to make, she would not be able to fund the plan. Accordingly, the Court denied confirmation.

At the request of the parties, the Court also agreed to receive proposed findings of fact and conclusions of law on the question of whether Squires had proposed her plan in good faith. Squires and Veterans Affairs both submitted such proposed findings and conclusions, and the matter was taken under advisement.

Discussion. A Chapter 13 plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). The analysis of what constitutes "good faith" under § 1325(a)(3) has evolved over the years.

Prior to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984) ["BAFJA"], our analysis focused upon "whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13." *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982). This required looking to the totality of circumstances to discern whether good faith existed, a task aided by the *Estus* court listing a number of factors it considered relevant to this analysis.

Handein v. LeMaire (In re LeMaire), 898 F.2d 1346, 1348 (8th Cir. 1990). That analysis changed with BAFJA's addition of 11 U.S.C. § 1325(b), which permitted Bankruptcy Courts to confirm a Chapter 13 plan if the debtor committed all the debtor's disposable income for three years to making payments under the plan.

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In *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987), we considered the effect of the new section 1325(b) on the *Estus* analysis of good faith. We stated that the new section's "ability to pay" criteria subsumed most of the *Estus* factors and thus narrowed the focus of the good faith inquiry. We described the narrower focus as depending upon "whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.

LeMaire, 898 F.2d at 1349 (citations omitted). However, the Court must still consider the "totality of circumstances."

Although *Zellner* modified the good faith determination in response to the new section 1325(b), it is recognized that *Zellner* preserved the traditional "totality of circumstances" approach with respect to *Estus* factors not addressed by the legislative amendments. Thus, in considering whether [Debtor] proposed his plan in good faith, factors such as the type of debt sought to be discharged and whether the debt is nondischargeable in Chapter 7, and the debtor's motivation and sincerity in seeking Chapter 13 relief are particularly relevant.

Id. (citations omitted).

In the instant case, both those "particularly relevant" factors amply support a finding that Squires did not propose her plan in good faith.² Squires's counsel conceded, for the purposes of the confirmation hearing, the debt owed to Veterans Affairs would be nondischargeable in Chapter 7.

Having heard her testimony and having observed her demeanor while on the witness stand, the Court is firmly convinced that in seeking Chapter 13 relief, Squires was motivated by two things. First, she wanted to accomplish in Chapter 13 what she had not accomplished - and indeed could not accomplish - in her then still pending Chapter 7 case, i.e., a discharge of her obligation to Veterans Affairs. Second, she wanted to file the instant Chapter

² The Court reviewed and considered both the remaining *Estus* factors and the more narrowly focused *Zellner* factors. However, given the facts and circumstances of this case, the Court finds none of those other factors, either individually or taken together, outweighs the two factors highlighted in *LeMaire*. Cf. *LeMaire*, 898 F.2d at 1351 n.7.

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13 before October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, under which fraud-based claims such as the one held by Veterans Affairs would no longer be dischargeable in Chapter 13. See 11 U.S.C. § 1325(a)(2). Neither of these motivations evidences good faith.

Likewise, nothing in either her plan or her testimony persuades the Court Squires was sincere in seeking Chapter 13 relief. She clearly had no real desire to repay Veterans Affairs' claim. She did not even propose a payment to Veterans Affairs - her lone unsecured creditor - in her plan. *Cf. In re Mattson*, 241 B.R. 629, 637 (Bankr. D. Minn. 1999) (citations therein) ("The bottom line for most courts, even those outside of [the Eighth] Circuit, is whether the debtor is attempting to thwart his creditors or is making an honest attempt to repay them."). Moreover, even if she truly wished to repay Veterans Affairs, Squires does not have the present ability to fund a plan. Filing a Chapter 13 case was therefore pointless and served no legitimate purpose.

Finally, the Court cannot overlook the facts and circumstances giving rise to Veterans Affairs' claim against Squires. *LeMaire*, 898 F.2d at 1352 (citations omitted) ("While pre-filing conduct is not determinative of the good faith issue, it is nevertheless relevant."). Misstating a spouse's income and net worth is certainly not as serious as shooting someone, as the debtor in *LeMaire* did. However, Squires's actions in misstating her husband's income and net worth, not once, but three times over the course of several years - the last time after judgment had been entered against her for misstating his income and net worth the first time - provide further support for the Court's finding that Squires did not propose her plan in good faith, particularly in the absence of any credible evidence of her good faith. See *id.*

The Court's finding that Squires did not propose her plan in good faith is also consistent with the policies underlying the Bankruptcy Code, as espoused by the Eighth Circuit Court of Appeals.

[T]he primary purpose of the bankruptcy statute . . . is the collection and distribution of the debtor's estate to his creditors. A secondary purpose is to discharge the debtor's financial obligations and is "designed to give the honest debtor the opportunity to reinstate himself in the business world; it is not intended to be available to a dishonest debtor."

Id. at 1352 (citations omitted). Squires was undeniably less than honest in her dealings with Veterans Affairs prior to the filing of her bankruptcy petitions. Under these circumstances, the Court

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cannot condone her attempt to now manipulate the Bankruptcy Code to obtain relief not intended by Congress.

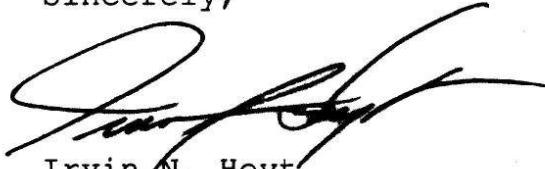
We hold that with section 1325(a)(3) Congress intended to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.

Shell Oil Company v. Waldron (In re Waldron), 785 F.2d 936, 941 (11th Cir. 1986) (cited in *LeMaire*, 898 F.2d at 1352 n.8). By this decision, the Court is doing just that, preserving the integrity of the bankruptcy process by refusing to condone its abuse.

As noted above, the Court previously found Squires's Chapter 13 plan was not feasible. For all the reasons discussed herein, the Court finds, as an additional ground for denying confirmation, Squires did not propose her plan in good faith. The Court will enter an appropriate order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve copies on counsel)

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice and Debtor(s), if Debtor(s) did not receive electronic notice.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota